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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BETH HARRIS et al., Plaintiffs and Appellants, v. TRIPLE A MACHINE SHOP, INC. et al., Defendants and Respondents.	A153794 (Alameda County Super. Ct. No. RG14725868)

In this asbestos case, Beth Harris and her children appeal the trial court's grant of summary judgment in favor of defendant Triple A Machine Shop, Inc. (Triple A). We conclude the evidence creates a triable issue as to whether Triple A's repair work on a United States Navy ship exposed decedent Michael Harris to asbestos. Accordingly, we reverse the grant of summary judgment.[1]

BACKGROUND

Mr. Harris was diagnosed with mesothelioma in March 2014. Two months later, he and his wife Beth Harris filed a personal injury complaint against numerous defendants alleging causes of action for negligence, strict liability and loss of consortium. Mr. Harris passed away in October 2014. In July 2015, Mrs. Harris and her children

[1] In a separate order filed the same day, the trial court granted summary judgment in favor of defendant Thomas Dee Engineering Company. The appeal of that ruling has been stayed. (*Beth Harris et al. v. Thomas Dee Engineering Co.*, No. A153106.)

(Plaintiffs) amended the complaint to assert wrongful death and survival claims. Triple A answered the amended complaint denying the allegations.

In June 2017, Triple A moved for summary judgment arguing Plaintiffs "do not possess evidence that decedent Michael Harris was exposed to asbestos by Triple A employees or evidence that supports the causes of action plaintiffs assert against Triple A." Plaintiffs opposed the motion. The court held a hearing on the motion and granted it.

The court's order states: "Decedent served as a hull maintenance technician primarily responsible for maintaining the fire main systems on the [USS] San Jose in the early 1970s, including a period of 4 weeks to 2 months in late 1973 during which Triple A and various subcontractors overhauled the [USS] San Jose in Triple A's ship-repair facility in San Francisco. . . . Plaintiffs' theory of exposure is that Triple A employees removed, installed, and disturbed asbestos-containing gaskets and refractory material, including thermal insulation, from boilers and from equipment in the engine room that is not specified, but to which Decedent referred at one point in his deposition as 'all of it,' meaning all the equipment in the engine room, and that Decedent was present in the engine room for roughly 20 non-continuous hours during this work, and would have been exposed during the work to respirable asbestos fibers, and also exposed to such fibers for some time after the work via re-entrainment. . . . Plaintiffs base this theory on Decedent's testimony about his duties and about Triple A's work during the overhaul, and on the deposition testimony and declaration of [Plaintiffs' expert,] Mr. Ewing, as well as what seems to be a handwritten Triple A 'job file' for the work that Ewing reviewed and discussed."

However, the court determined the "crucial gap in Plaintiffs' theory—the link in the chain of exposure as to which their discovery responses, including Decedent's and Ewing's depositions, are factually devoid—is the lack of any facts suggesting either that Triple A workers manipulated asbestos-containing materials in the engine room where Decedent described himself as having worked alongside such workers, or that Decedent was near boilers during or at any specific point soon after Triple A workers manipulated

asbestos-containing refractory materials." The court noted "no witness can establish Decedent's presence when asbestos fibers were released into the air." The court stated that "even if gaskets or packing in the engine room or in boilers may have contained asbestos, and even accepting that it was Triple A's general practice to remove such materials in ways generating respirable dust and fibers, Plaintiffs' discovery responses are devoid of specific facts suggesting that they have evidence Triple A engaged in that in Decedent's presence."

The court granted the motion for summary judgment, concluding "Plaintiffs' discovery responses are devoid of specified facts suggesting . . . Decedent was exposed to any respirable asbestos fibers that may have been generated by Triple A's work on the [USS] San Jose." The court entered judgment in favor of Triple A. Plaintiffs appeal.[2]

DISCUSSION

On appeal, Plaintiffs argue the court erred by relying "s*olely* on Michael's testimony that he was unaware of whether he was exposed to asbestos by Triple A." Second, they contend the court "failed to apply the correct standard for proving the issue of exposure in asbestos cases." Third, they argue the court impermissibly "weighed the evidence and resolved disputed issues of fact, concluding that Michael was not exposed to asbestos by Triple A's actions." We agree with Plaintiffs that there is a triable issue as to whether Triple A's actions exposed Mr. Harris to asbestos. Accordingly, we reverse the judgment.

I. *Governing Law and Standard of Review*

A summary judgment motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . . [T]he court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence . . . ." (Code

[2] The judgment was entered after the notice of appeal was filed. We "treat the appeal as from that judgment." (*Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal.App.4th 125, 129, fn. 1.)

Civ. Proc., § 437c, subd. (c).)[3] A defendant moving for summary judgment meets its burden of showing no triable issue by showing one or more elements of the cause of action cannot be established or by showing a complete defense to the cause of action. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

"The defendant is not required conclusively to negate an element of the plaintiff's cause of action. The defendant need only show the plaintiff cannot establish at least one element of the cause of action, such as by showing the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1438.) The burden then shifts to the plaintiff to show that a triable issue of material fact exists. (§ 437c, subd. (p)(2).) "The plaintiff . . . shall not rely upon the allegations . . . of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (*Ibid.*) We review a decision on a summary judgment motion de novo, viewing the evidence in a light favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

"In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, *and* must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982, fn. omitted.) The *Rutherford* court declined to "endorse any one particular standard for establishing the requisite *exposure* to a defendant's asbestos products . . . ." (*Id.* at p. 982, fn. 12.) In cases where there is no direct evidence of exposure, the circumstantial evidence must be "sufficient to support a reasonable inference of exposure." (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1420.)

II. *There Is a Triable Issue as to Whether Triple A's Repair Work Exposed Mr. Harris to Asbestos*

[3] All undesignated statutory references are to the Code of Civil Procedure.

Here, in moving for summary judgment, Triple A relied on Plaintiffs' responses to interrogatories and Mr. Harris's deposition testimony to argue there was no evidence Triple A exposed Mr. Harris to asbestos. This evidence established Mr. Harris was a hull maintenance technician in the Navy between 1970 and 1974. He worked aboard the USS San Jose while it was overhauled at Triple A's facility in San Francisco between October and December 1973. Mr. Harris's duties included "removing and replacing flange gaskets, tightening and replacing packing, removing thermal insulation on valves and other equipment, and removing and repairing valves and piping. He also worked near others that removed equipment and parts from the U.S.S. San Jose while overhauled at Triple A Machine Shop in San Francisco."

According to Plaintiffs, Triple A "laborers . . . swept up, or otherwise disturbed, asbestos-containing products in Mr. Harris' presence." However, in his deposition, Mr. Harris stated he did not know the brand name or manufacturer of any of the equipment he saw Triple A employees work on in the engine room. He could not recall if Triple A employees worked with any gasket material or packing material. When asked if he saw them work with any thermal insulation, Mr. Harris responded "No." Nor did he know if any of the materials or equipment Triple A personnel worked on in the engine room contained asbestos.

Assuming without deciding that this evidence was sufficient to shift the burden to Plaintiffs, we conclude the evidence presented in opposition to the motion creates a triable issue as to whether Triple A exposed Mr. Harris to asbestos. In opposing the motion, Plaintiffs relied on evidence including Mr. Harris's testimony, Triple A's job file for the overhaul of the ship, and the testimony and declaration of William Ewing, an industrial hygienist and Plaintiffs' expert.

A. *Mr. Harris's Testimony*

Mr. Harris testified he was on the USS San Jose when it was repaired at Triple A's shipyard. When asked if he saw "yardbirds coming in and out of the ship," and "bringing materials in and off of the ship," Mr. Harris responded: "Yes." According to Mr. Harris, Triple A employees worked in the ship's engine room. He testified the repair work

occurred in the "engine rooms and boiler rooms." Mr. Harris estimated he spent a total of 20 hours in the engine room while the ship was in the Triple A shipyard. He did not spend any of this time in the boiler room. Nonetheless, he recalled that Triple A's work involved "removing/installing gaskets, machining parts, installing new pieces."

Mr. Harris stated that Triple A employees "were the only people working down in the engine rooms. And that's where I'd have seen them, is in the engine rooms and in the passageways, as they get on the ship, through the ladders and down the hallways to the engine rooms." Mr. Harris's understanding of Triple A's work was based on "what I seen them doing, the people. And they said they were Triple A." When asked if he had a specific recollection of seeing Triple A employees perform work on the ship, Mr. Harris responded: "Yes." He saw Triple A employees work on "Equipment in the engine rooms." When asked what type of equipment, he stated: "I couldn't be specific[;] all of it." Mr. Harris did not observe Triple A employees wearing respiratory protection.

Mr. Harris's duties included serving watch, which required him to "patrol every part of that ship, checking for leaks and fires and people being in unauthorized areas, or areas where they're not supposed to be." Mr. Harris's watch duties lasted four hours and he was required to stand watch "About every other day." His watch duties included patrolling the engine room. The ship was being repaired the entire time it was at Triple A's shipyard.

B. *The Job File and Plaintiffs' Expert*

Plaintiffs also relied on Triple A's job file for the overhaul of the ship, which described the repair work as including the cleaning of " 'all rust, dirt and asbestos.' "[4]

[4] This document is described in a declaration as "the Boiler Repair Job File 1248." Triple A objected to its admissibility, but the court did not rule on the objections. Triple A requests that we do so. We find the document relevant and, as Triple A's job file, it is admissible under the hearsay exception for a statement of a party-opponent. (Evid. Code, § 1220.) Although the text of this handwritten document is difficult to decipher, its content is sufficient to authenticate it as a description of the work performed or to be performed on the USS San Jose. (Evid. Code, § 1410.) Triple A objects that the document appears incomplete, but Triple A does not argue it creates a misleading impression regarding the nature of Triple A's repair work on the ship. (*People v. Clark*

William Ewing, an industrial hygienist and Plaintiffs' expert, testified in his deposition that this document described Triple A's work on the USS San Jose, and "[a]lmost all of it appears to be in the engine room . . . ." It described work to be performed "on three boilers and materials that will be used on those, the refractory work, gasket work." When describing Triple A's work, Ewing opined "the insulation and refractory would have had some asbestos associated with it. Certainly the gaskets would have." With regard to "the thermal system insulation," Ewing testified that "What was going back in in 1973 might have been asbestos-containing, might not have been asbestos-containing. I can't draw a conclusion one way or the other really on that because of the time frame. [¶] But what came out, if you have boiler house cement coming out, you're putting boiler house cement back in, what came out likely was asbestos-containing."

Similarly, in his declaration in opposition to the summary judgment motion, Ewing opined that the thermal insulation, gasket and packing materials "being removed . . . [and] swept up . . . on the USS San Jose while Mr. Harris was working in and/or standing fire watch in the engine/fire room [were] more likely than not asbestos-containing." Ewing further explained that "Mr. Harris did not need to [be] present at the exact time that the thermal insulation, gasket, or packing material was being removed, swept up, and/or installed by Triple A workers. When asbestos fibers become airborne they do not immediately settle to the ground . . . . They fall slowly depending largely upon their size and orientation . . . . [T]hey may take hours or even days to settle out of the air. . . . Additionally, activities such as dusting or sweeping will reentrain some of the asbestos-containing dust that [has] settled, thereby exposing persons in the engine/boiler room." He explained that "respirable asbestos fibers that are released into the air will remain in the air for quite some time before they alight on surfaces, on workers' clothing, and on persons and personal effects. Those fibers are then subject to re-suspension through a process known as re-entrainment."

(2016) 63 Cal.4th 522, 599–600 [purpose of Evidence Code section 356 rule of completeness is to prevent using part of a writing to create a misleading impression].) Accordingly, we overrule Triple A's objections.

C. *The Declaration of Plaintiffs' Expert Is Admissible*

In our view, this evidence supports a reasonable inference that Triple A workers disturbed asbestos-containing materials as part of their repair work on the USS San Jose in late 1973, and that Mr. Harris was exposed to it. In arguing otherwise, Triple A contends the trial court "properly excluded" Ewing's declaration and his "new 're-entrainment' theory." Reviewing the matter de novo, Ewing's declaration does not contradict his deposition testimony: in both Ewing opined that Mr. Harris was likely exposed to asbestos during the removal of thermal insulation, gasket material and packing material from the USS San Jose in the fall of 1973. There is no indication Ewing was asked questions about a re-entrainment theory in his deposition. Nonetheless, Ewing's account, in his declaration, of how asbestos fibers become airborne and how certain activities can cause their "re-entrainment," was not a new, previously undisclosed theory; instead it was a more detailed explanation of how Triple A's work on the USS San Jose could have exposed Mr. Harris to asbestos.

Relying on cases such as *Jones v. Moore* (2000) 80 Cal.App.4th 557, 564–565 (*Jones*), and *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 919 (*Kennemur*), Triple A contends that when an expert testifies as to specific opinions and states those are his only opinions, then "he may be precluded from giving additional opinions not expressed during his deposition." But Ewing did not testify that the views expressed in his deposition were the only ones he intended to offer. He stated he did not know what he was going to be asked at trial, but he expected to testify regarding matters such as "what is asbestos? Where did it come from? How do you measure it? How big are these little fibers? Where do they go? What's a respirator?" Ewing's opinion in his declaration regarding how certain activities can cause the re-entrainment of asbestos fibers falls within the scope of this expected testimony.

Furthermore, *Jones* and *Kennemur* stand for the principle that "a party's expert may not offer testimony at trial that exceeds the scope of his deposition testimony *if* the opposing party has no notice or expectation that the expert will offer the new testimony, or *if* notice of the new testimony comes at a time when deposing the expert is

unreasonably difficult." (*Easterby v. Clark* (2009) 171 Cal.App.4th 772, 780.) But here we are concerned with an expert's opinions in a declaration in opposition to summary judgment, not his trial testimony. Thus, even if the re-entrainment theory was new, there is no indication Triple A could not have re-deposed Ewing prior to trial. (*See id.* at pp. 778, 780 [distinguishing *Jones* and *Kennemur* and concluding trial court erred in excluding expert witness's trial testimony because defendants "learned approximately three months before trial that [the expert witness] would go beyond his original deposition testimony . . . ."].) Nor are we persuaded that Ewing's declaration lacked a factual foundation because his opinions were based in part on a document describing Triple A's work as involving the cleaning of "rust, dirt and asbestos."[5]

D. *The Boiler Room versus Engine Room Issue*

Mr. Harris testified the boiler room and the engine room were separate, and he described the boilers as "adjacent" to the engine room. When asked if he spent any of his time during the repairs in the boiler room, Mr. Harris responded: "No." The trial court found this evidence did not create a triable issue that Triple A exposed Mr. Harris to asbestos because there was no evidence "suggesting either that Triple A workers manipulated asbestos-containing materials in the engine room where Decedent described himself as having worked alongside such workers, or that Decedent was near boilers during or at any specific point soon after Triple A workers manipulated asbestos-containing refractory materials."

We disagree. Mr. Harris testified Triple A employees worked in both "the engine rooms and the boiler rooms." Even if the boilers were not in the engine room, these rooms were adjacent. Mr. Harris observed workers bringing materials on and off the ship. The repair work to the boilers involved cleaning asbestos. Mr. Harris recalled Triple A workers removed and installed gaskets. Plaintiffs' expert testified that materials

[5] The testimony of Triple A's expert, Margaret McCloskey, is not inconsistent. She testified that "It is not improbable to think that some of the work that was assigned to Triple A could have entailed the removal of thermal insulation," but she also stated she did not know if it was "asbestos-containing thermal insulation."

being removed from the ship—including boiler house cement, insulation, refractory material, and gaskets—likely contained asbestos. While Mr. Harris was not present in the boiler room during repair work, he was present in the adjacent engine room, where he also observed Triple A employees working. Liberally construing this evidence, it is reasonable to infer either that Triple A's work in the engine room disturbed asbestos while Mr. Harris was present, or that he was in the engine room and passageways and exposed to re-entrained asbestos after Triple A's work disturbed asbestos in the adjacent boiler room. (*Ganoe v. Metalclad Insulation Corp.* (2014) 227 Cal.App.4th 1577, 1582 [" ' "In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party . . . ." ' "].)

In arguing otherwise, Triple A relies on our decision in *Johnson v. ArvinMeritor, Inc.* (2017) 9 Cal.App.5th 234, but this reliance is misplaced. In *Johnson*, the plaintiff sued a number of automotive parts manufacturers based on his alleged secondary exposure to asbestos from contamination brought into his home by his father, a mechanic. (*Id.* at p. 236.) We affirmed an order granting summary judgment in favor of various defendants because there was "no evidence to support an inference that the replacement brake linings [that the plaintiff's father] actually handled were probably supplied by one of the Defendants." (*Id.* at p. 245.) But here, unlike in *Johnson*, a document describes Triple A's work on the USS San Jose as involving the cleaning of asbestos. There is evidence that Mr. Harris was either present or in the next room or passing these workers in passageways during and after the time this repair work occurred. Thus, unlike in *Johnson*, there is circumstantial evidence supporting a reasonable inference that Triple A's work probably exposed Mr. Harris to asbestos.[6]

It is, of course, for the jury to decide whether the evidence of exposure is sufficient to prevail at trial, and we acknowledge there are ambiguities regarding the

[6] We disagree with Plaintiffs' contention that the plaintiff in an asbestos case merely has to prove a possibility of exposure. Instead, as we explained in *Johnson v. ArvinMeritor, Inc.*, *supra*, 9 Cal.App.5th at pages 244 to 245, the plaintiff must prove a probability of exposure.

nature of Triple A's work, precisely where it occurred, and what Mr. Harris observed. But at summary judgment, we must resolve " 'any evidentiary doubts or ambiguities in plaintiff's favor.' " (*Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 100.) Indeed, "to the extent that there is any ambiguity in the evidence . . . ' "the task of disambiguating ambiguous utterances is for trial, not for summary judgment." ' " (*Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 978.)

III. *Triple A's Remaining Arguments Fail*

Triple A argues that "proving there was actual exposure to a defendant's asbestos product alone is not enough to defeat summary judgment" because a plaintiff must also prove the exposure was a substantial factor in causing or contributing to the plaintiff's risk of developing cancer. But here, Triple A moved for summary judgment on the issue of exposure and the court's order focused on the evidence of exposure. Accordingly, we do not address whether the exposure, if any, was a substantial factor in bringing about Mr. Harris's mesothelioma. (See *Johnson v. ArvinMeritor, Inc.*, *supra*, 9 Cal.App.5th at p. 240 [noting that factors relevant to the substantial factor analysis may include " 'the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, any other potential causes to which the disease could be attributed (e.g., other asbestos products, cigarette smoking), and perhaps other factors affecting the assessment of comparative risk.' "].)

In arguing against Plaintiffs' theory that Mr. Harris was exposed to "re-entrained" asbestos, Triple A points out that in *Andrews v. Foster Wheeler LLC*, *supra*, 138 Cal.App.4th at pages 111–112, the court rejected a re-entrainment theory as unduly speculative. But in *Andrews*, the theory was that the plaintiff breathed in asbestos fibers "16 years after the last known time [defendant's] condensers were onboard." (*Id.* at p. 112.) In contrast, Mr. Harris was on the USS San Jose during the time that Triple A performed its repair work, not years later. Moreover, he observed Triple A employees working on equipment in the engine room, and bringing materials on and off the ship. Based on this evidence, there is a triable issue as to whether Mr. Harris was exposed to asbestos as a result of Triple A's repair work.

IV. *Summary Adjudication Issues*

When granting summary judgment, the trial court determined Triple A's alternative motion for summary adjudication was moot. In their opening brief on appeal, Plaintiffs contend Triple A's request for summary adjudication was procedurally defective, but they do not otherwise address the summary adjudication issues. Triple A does not respond to this argument, instead requesting that if we reverse the judgment, "the matter be remanded to the trial court for a determination as to its alternative request for summary adjudication of issues." Plaintiffs do not oppose this request in their reply brief. We remand to the trial court to determine whether and how to address Triple A's arguments in support of summary adjudication in the first instance. (See *Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 100–101 [remanding for trial court to consider additional grounds urged for grant of summary judgment].)

DISPOSITION

We reverse the order granting summary judgment in favor of Triple A. Plaintiffs are entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

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Jones, P.J.

WE CONCUR:

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Simons, J.

_____
Burns, J.

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